United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-2677

IN THE

United States Court of Appeals

For the Second Circuit

No. 74-2677

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

MARTIN L. ROEMER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT MARTIN L. ROEMER

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Appellant
Martin L. Roemer
522 Fifth Avenue
New York, New York 10036
687-4100

JAMES M. LAROSSA
GERALD L. SHARGEL
of Counsel

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UNITED STATES OF AMERICA,

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REPLY BRIEF FOR APPELLANT
MARTIN L. ROEMER

In Appellant's main brief, it was noted that the issue regarding application of Rule 6 of the District Court Plan for Achieving Prompt Disposition of Criminal Cases was one of first impression in this Court. (App. Br., Point I, p.21) That is no longer the case. Since the filing of Appellant's brief, this Court has considered the application and effect of Rule 6 in United States v. Drummond, --- F.2d --- (2nd

Cir., February 11th, 1975), sl.op. p.1781. On the District Court level, a memorandum opinion in United States v. Carone, --- F.Supp. --- (S.D.N.Y., March 4th, 1975), 70 Cr. 132 (Tenney, J.), a case factually related to that at bar, denied defendant's Motion to dismiss under Rule 6 on the authority of the Drummond decision. In its answering brief, the Government essentially relies on Drummond and Carone in support of its position that the conviction herein should be affirmed.

Appellant, Martin L. Roemer, submits that the decision in Drummond is not dispositive of the case at bar and further, that the interpretation of Rule 6 in Drummond is supportive of Appellant's position. Moreover, Appellant contends that Judge Tenney's decision in the Carone case was an incorrect application of Drummond to a factual pattern similar to that at bar.

THE DRUMMOND DECISION

In United States v. Drummond, supra., as in the case at bar, more than ninety days passed before the defendant was brought to trial after final judgment in the Appellate process. In Drummond, the Appellant argued, as does the Appellant in the case at bar, that the delay of his re-trial violated the

District Court's speedy trial rules. After considering the scope and application of Rule 6, this Court affirmed Drummond's conviction on the basis of the rule's "escape hatch" of "good cause." This analysis, without doubt, suggested that issues of this sort must be decided on a case-by-case basis. Judge Feinberg, in Drummond, articulated the fact that the good cause exception excused the delay "in this case", sl.op. p.1786, (emphasis supplied).

Before comparing the "good cause" found in Drummond to the Government's allegation of good cause in the case at bar, it is appropriate to note the Drummond panel's interpretation of the effect of Rule 6. In short, this Court held in Drummond that Rule 6 means what it says. The mere fact that the Government is ready to try the case is insufficient as the rule holds that trials in this category "shall commence" within ninety days. As the Appellant argued in his main brief, and as this Court held in Drummond, merely requiring the Government to be ready for trial within ninety days would reduce the rule to an "empty formality." This Court found, therefore, that Rule 6 requires that these cases be tried within the prescribed ninety-day period. Delay beyond the ninety-day period can only be excused by a finding of "good cause." In Drummond,

this Court affirmed the conviction due to a sufficient showing of "good cause." In the case at bar, no such showing has or could be made.

In Drummond, this Court concluded that there was a sufficient showing of good cause to excuse the delay on a finding that (1) after reversal, the case was assigned to a District Court Judge who was about to start proceedings in an extraordinary criminal case which lasted nine months and which enveloped the Court's schedule, (2) the prosecution was ready to re-try Drummond "without undue delay" and apparently misapprehended the impact of Rule 6 which became part of the District Court Plan adopted "a few months before," (3) the fact that Drummond was free on bail throughout the period of delay and (4) that Drummond made no request that Judge Travia re-assign the trial.[1/]

The Government would have this Court find that the identical factors are present in the case at bar. (Gov't. Br., p.15)

[1/] With regard to the last two factors, the Drummond Court noted that these factors were "significant...in the context of this case and on these facts..." sl.op. p.1788 (emphasis supplied).

No such finding is warranted. In the first place, the Drummond Court noted that Rule 6 had been in effect for only a few months and that the Government "obviously misapprehended the change." In the case at bar, Rule 6 had been in effect nearly one year when the Supreme Court denied certiorari on March 18th, 1974.[2/] In mid-April, 1974, the defendant Drummond moved before an Eastern District Judge for dismissal on the basis of Rule 6. In May of 1974, a mandamus petition in this Court sought to prevent his trial on this very same issue. Whatever the responsibility may be for one United States Attorney to communicate with his counterpart on the other side of the Brooklyn Bridge,[3/] the fact remains that the Government here had sufficient time and opportunity to appreciate the change brought about by the District Court Plan. See, Giglio v. United States, 405 U.S. 150 (1972); Santobello v. New York, 404 U.S. 257 (1971). While the rulings Drummond received during this

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[2/] The District Court Plan was approved February 28th, 1973, effective April 1st, 1973.

[3/] See, United States v. Candella, 487 F.2d 1223, 1227 (2nd Cir., 1973).

period were not advserse to the Government's position, it was clear that there was a bone of contention regarding the efficacy of Rule 6.

The Government further stresses that, as in Drummond, Roemer was free on bail throughout the entire period and made no request that the case be brought to trial. In sharp contrast with Drummond, the prosecution of Roemer was, from its inception, stigmatized by delay. The conspiracy allegedly began in 1962 and lasted until 1966. The Indictment was not filed until February 25th, 1970. Because of delay, the Indictment was dismissed in December of 1972. The case then remained in the Appellate process until March 18th, 1974. In spite of this protracted history, the record discloses that the Government did nothing until 129 days later. The oppressive nature of this prosecution - Roemer was not tried until nearly five years after he was charged and some eight years after the alleged conspiracy ended - while perhaps eased, is not relieved by the fact that the Appellant was free on bail. This was not a narcotics case. Accepting the jury's verdict, Roemer was an isolated offender. Uncertainty and stigmatization brought about by the inordinate length of

this prosecution, demonstrates that the consequences suffered are comparable to pre-trial detention where, upon conviction, a prison term is indicated.

Moreover, the Government argues that, as in Drummond, there was during the period of delay, "not a word from Roemer about a prompt trial." (Gov't. Br., p.16) The fact is, however, that the "word from Roemer about a prompt trial..." came in the Spring of 1972. The Government's attempt to stress Roemer's inaction is entirely inappropriate in a case which has been "freighted all along with the issue of a lack of speedy trial."[4/]

THE GOVERNMENT'S ALLEGATION OF GOOD CAUSE.

In addition to the above outlined factors, the Government submits what can only be described as a bizarre series of mishaps which caused the 129-day period of delay. First, Appellant questions the procedure of submitting factual affidavits in regard to this case for the first time in this Court. The

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4/ Letter of Judge Lasker dated July 31st, 1974. (A 34)

record, as was transmitted to this Court from the District Court, indicates that Judge Lasker was not informed of the Supreme Court action until July 24th, 1974. (A 34) In a letter to Judge Lasker dated July 25th, 1974, a Government attorney stated that the Court's secretary had been informed of the denial of certiorari "in May or early June, 1974." A letter which was intended to confirm that conversation was never received by Judge Lasker. As chance would have it, there is no copy of any such letter in the Government's file. On that date, the Government stated that:

> "Unless we find a copy of that letter, we will have to assume that it was never sent." (A 32)

On appeal, the Government retreats from this position. Now the Government alleges that Judge Lasker's secretary failed to inform him about the telephone conversation with the prosecuting attorney in May or early June. The Government also notes the "failure" of the District Court Judge to receive a letter allegedly sent by the assistant prosecutor shortly after this telephone conversation which the secretary failed to report. As noted, no copy of this letter can be found.

Additionally, the Government now submits that:

> "Because of an internal breakdown of communications from the Solicitor General's office, [the government attorney] did not receive notification of the Supreme Court action."

In view of the fact that this action appeared in the Criminal Law Reporter on March 20th, 1974, 14 Cr.L. 4222 and the United States Law Week on March 19th, 1974, 42 L.W. 3523, this "excuse" is hardly worth noting.

Displaying extraordinary ingenuity, the Government further reasons that the failure to inform Judge Lasker of the Supreme Court's action was attributable to "his attorneys" before the United States Supreme Court. In effect, the Government employs fiction to shift the primary responsibility to see that the case is properly disposed of. This contention is patently specious.

THE CARONE DECISION

When the Government's argument is stripped to its bare essentials, it seems to infer that any cause as opposed to "good cause" is sufficient to excuse a violation of Rule 6. In effect, that was the holding in United States v. Carone, supra. The failures of communication at best exemplified

gross negligence. Oblivion to the change brought about by Rule 6 nearly one year after its effective date, can hardly be excused. In Drummond, this Court stated that:

> "We do not see how the plain language of Rule 6 can be ignored." (sl.op. p.1786).

Government naivete, on the facts of this case, simply cannot carry the day.

WAIVER

The Government contends that Martin L. Roemer waived his right under Rule 6 because, in moving to dismiss the Indictment pursuant to the Southern District Plan, specific reference was drawn to Rule 4. Therefore, the argument goes that, under Rule 7, Roemer waived his Rule 6 argument. It is interesting to note that in Drummond, the Government argued that Rule 6 "is part of an integrated speedy trial plan..." (sl.op. p.1784, emphasis supplied). For purposes of this case, the Government seeks to isolate Rule 6 to support its contention of waiver. It is here submitted that the fact that trial counsel moved for dismissal of the Indictment pursuant to the Southern District Plan is sufficient to preserve the argument now raised in this Court.

APPLICATION OF RULE 6

As anticipated in Appellant's main brief, the Government has argued that Rule 6, captioned "Retrials", does not apply to this case because this Court, in United States v. Lasker, supra., did not order a "trial", but merely ordered that the Indictments be reinstated. (Gov't. Br., p.11) The Appellant addressed himself to this issue in his original brief. (App. Br., p.19) It should be noted here, however, that the Government's view was squarely rejected by Judge Tenney in the Carone decision. (Addendum to Gov't. Br., p.6A)

CONCLUSION

Recently, in United States v. Feury, --- F.2d --- (2nd Cir., February 25th, 1974), sl.op. p.1917, this Court noted with regard to the District Court Plan that the dramatic sanction of dismissal with prejudice is necessary to "put teeth into the scheme..." sl.op. p.1930. This case, it is submitted, is an appropriate vehicle to bare the teeth in Rule 6.

For the reasons stated in this brief and in Appellant's

main brief, the Judgment of Conviction should be reversed.

Respectfully submitted,

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant

JAMES M. LA ROSSA
GERALD L. SHARGEL
Of Counsel

Service of three ~~2~~ copies of the within
is admitted this day of 19